Supreme Court, U.S.
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No. 98-1181

In The

Supreme Court of the United States

October Term, 1998

MARY HITCHCOCK MEMORIAL HOSPITAL, et al.,

Petitioners,

v.

RICHARD F. KLONOSKI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should this Honorable Court agree to review a decision of the Court of Appeals for the First Circuit in a diversity action reversing and remanding for a new trial on the basis of well established precedent regarding egregious discovery abuse, where the decision is not in conflict with the decision of another United States Court of Appeals; is not in conflict with a state court of last resort on an important federal question; does not depart from the accepted and usual course of judicial proceedings; and does not decide an important question of federal law that has not been, but should be decided by this Court, or decide an important question of federal law that in a way conflicts with relevant decisions of this Court?

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BRIEF IN OPPOSITION

Richard F. Klonoski, M.D., as he is Administrator of the Estate of his late wife Jolanta Klonoski, respectfully opposes the petition of Mary Hitchcock Memorial Hospital (hereafter "the Hospital"), Hitchcock Clinic, Inc., and Benjamin Mahlab, M.D., for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

FEDERAL RULES INVOLVED

No constitutional provisions, treaties, statutes, ordinances or regulations are implicated in this Petition. Rules 26 and 37 of the Federal Rules of Civil Procedure are involved in this Petition and are reprinted at App. 78a-81a to the Petition. Rules 59 and 60 of the Federal Rules of Civil Procedure are also involved in this Petition and are reproduced at pages App. 1-2 to this Opposition.

STATEMENT OF THE CASE

Factual Background

Richard F. Klonoski, M.D., as Administrator of the Estate of his late wife Jolanta Klonoski, is prosecuting this action alleging that the medical malpractice of defendant-petitioners caused his late wife to experience conscious pain and suffering and to die in childbirth in May of 1993 as a result of failures of the defendant-petitioners to diagnose and properly treat the condition known as pre-eclampsia. The defendant-petitioners stipulated at trial

that they had breached the applicable standards of care in several key respects but denied certain other breaches and denied causation. Ct. App. JA 592-594.

Pre-Trial Discovery

Because the defendant-petitioners hinted during discovery that they possessed evidence of marital discord between the Klonoskis, but had not produced such evidence or identified its source in discovery, plaintiff-respondent moved for, and obtained, a discovery order compelling the disclosure of all such evidence (hereafter "the July 1996 discovery order"). Ct. App. JA 532-551. Defendant-petitioners responded by identifying expected testimony from Dr. Klonoski's colleagues at the Hospital, where he was a cardiology fellow, which was substantially different in degree and nature from the contents of the letters. Much later, on December 30, 1996 (less than two weeks before the commencement of trial), the defendants supplemented their response by identifying Dawn Raftery, the niece of the Charge Nurse at the Hospital with primary responsibility for Mrs. Klonoski's care before the latter's death, and a co-worker with Mrs. Klonoski at a local bank during Mrs. Klonoski's last employment. Ct. App. JA 572-574. Over plaintiff's objection, Ct. App. JA 576-582, defendants added Ms. Raftery to their witness list and indicated that she would testify to comments by Mrs. Klonoski regarding dissatisfaction with her marriage. Defendants made no reference to the letters, or to any information possessed by Mrs. Klonoski's sister regarding her marriage to Dr. Klonoski.

Plaintiff provided the name and address of Mrs. Klonoski's father, with whom her sister (who shared the same surname) lived, in discovery more than a year before trial. App. 3a, 36a. Plaintiff had no knowledge of his wife's apparent dissatisfaction with the marriage, App. 23a, or of the existence of the letters. App 2a.

Proceedings Below

At the conclusion of plaintiff's case, on the thirteenth day of trial during the cross-examination of plaintiff, defense counsel confronted Dr. Klonoski with a hitherto undisclosed letter written by Mrs. Klonoski shortly before her death to her sister in Poland. In the letter, Mrs. Klonoski spoke about her husband in vitriolic terms, and professed her desire for a divorce. App. 21a. Neither Dr. Klonoski nor his attorneys had been aware, until that moment, that any such letters existed. App. 2a, 38a.

Over plaintiff-respondent's vehement objections, the District Court admitted into evidence particularly inflammatory excerpts from that letter, and several others similar in content produced by the defendant-petitioners over the intervening weekend (hereafter "the letters" or "the letter excerpts"). App. 219. The case went to the jury shortly after a translator read the excerpts into evidence. The jury returned a defendants' verdict in less than two hours, Ct. App. JA 737, which included their consumption of lunch.

Thereafter, the District Court denied plaintiff-respondent's Motion for a New Trial, although stating several times in the Order that he would have reached the contrary result. Ct. App. JA 732, 735-736. The Motion was

based on discovery abuse relating to non-disclosure of the letters, the perjurious testimony of several nurses employed by the Hospital, and insufficiency of the evidence.

On appeal, the Court of Appeals reversed on the issue of discovery abuse and, finding that ground to be dispositive, did not reach the other two grounds asserted by plaintiff-respondent. App. 2a. The opinion of the Court of Appeals is lengthy, meticulous in its analysis, and devoid of any of the issues or reasons justifying the granting of a petition for a writ of certiorari. *See generally* Rule 10 of the Supreme Court Rules.

Federal Law Implicated in Petition

No federal statutes are involved in any way in this diversity action. However, because the Petition seeks review of a Court of Appeals opinion which addresses discovery abuses and the corresponding abuse of discretion embodied in the District Court's failure to grant a new trial, several federal rules are implicated. Those rules, in the order in which the Court of Appeals analyzed them, are as follows:

Fed. R. Civ. P. 26(a)(3)(c) requires each party to disclose to all other parties, without awaiting a discovery request, an appropriate identification of every document or exhibit which the party expects to offer, or which the party may offer if the need arises, at trial. The Court of Appeals began its analysis of defendant-petitioners discovery conduct by noting, "[i]t is obvious that the defendants did not follow the strictures of Rule 26(a)(3)(c) with

respect to the letters from Mrs. Klonoski to her sister." App. 25a.

The Court of Appeals next referenced Rule 26(b)(1) with regard to the general scope of discovery, and noted that the Rule "provides no exception for documents found during belated investigation that takes place after the trial has begun" and that "the plain language of this Rule 26(b)(1) contemplates wide-ranging discovery to the fullest possible extent." App. 25a.

With regard to Rule 26, the Court ultimately concluded, "[b]ased on the plain language of Rule 26 and the broad scope that it has been given, it would appear that Mrs. Klonoski's letters fit well within the rule's reach." App. 27a. Lest there be any doubt about the status of materials acquired after an original production, the Court pointed to the requirement of prompt supplementation under Rule 26(e), particularly following the amendment of that rule in 1993. App. 27a-28a.

After the Court of Appeals reached its conclusions as to the applicability of several provisions of Rule 26 to the letters, the Court next turned to the matter of the appropriate sanction, where investigation, discovery of relevant information, and production to the other side were not accomplished within the time frames anticipated by the Federal Rules of Civil Procedure. Specifically, the Court addressed the provisions of Fed. R. Civ. P. 37(c)(1), dealing with failures to disclose and misleading disclosures. The Court noted that imposition of a sanction is mandatory unless the failure to disclose is harmless, and that, although the trial court has discretion to select other

sanctions, "the required sanction in the ordinary case is mandatory preclusion." App. 29a-30a.

The Court of Appeals then returned to an analysis of the language in Fed. R. Civ. P. 26(a)(3) which excepts from the disclosure requirement evidence which a party may present "solely for impeachment purposes." Having concluded that there was no other way to avoid the mandatory disclosure/sanction requirements of Rules 26 and 37, the Court of Appeals accorded the District Court the benefit of the doubt by concluding that the District Court reached a different conclusion "because it found the letters to fall within the exception to the discovery rules for material that is presented 'solely for impeachment purposes.' Fed. R. Civ. P. 26(a)(3)."[1] App. 31a. However, the Court of Appeals went on to rule as a matter of law that the letters did not fall within the impeachment exception to the discovery requirement because they also constituted substantive evidence. App. 33a.

The final rules analyzed in the decision of the Court of Appeals are Fed. R. Civ. P. 59 and 60. Because the District Court had committed an error of law by admitting the letter excerpts, it followed that the District Court

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[1] This was a benefit of the doubt to which the District Court was not actually entitled. Although the judge initially stated that the letters were relevant to the extent that they contradicted Dr. Klonoski's view of the marriage (*i.e.*, impeached Dr. Klonoski), App. 19a-20a, he then admitted the letters as party admissions under Rule 802(d)(2) of the Federal Rules of Evidence, Ct. App. JA 3660, and subsequently limited their substantive use as evidence bearing on hedonic damages. S. Ct. App. JA 3855-3856.

abused its discretion by denying the plaintiff-respondent's Motion for a New Trial. App. 40a-45a.

None of the rulings of the Court of Appeals regarding any of the federal rules presents a novel issue, an issue otherwise of import, an issue on which the Circuits are split, or an issue satisfying any of the traditional criteria for the granting of a petition for a writ of certiorari.

REASONS THE WRIT SHOULD BE DENIED

In a lengthy and carefully analyzed decision decrying "trial by ambush," the Court of Appeals concluded that the District Court had erred as a matter of law in allowing the letter excerpts into evidence (relying upon *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988)), and that it had consequently abused its discretion in not granting plaintiff's motion for a new trial. App. 44a. The defendant-petitioners express two reasons that their writ should be granted. The first, contending that the District Court "replaced the trial court's factfinding with its own," misrepresents the basis for the rulings of the Court of Appeals. The second, that the Court of Appeals ignored the proposition that a jury is presumed to follow its instructions, disregards (a) the established rule of law regarding sanctions for discovery abuses, and (b) the "exceptional circumstances" exception to the presumption upon which the defendant-petitioners rely.

In sum, absolutely no reason exists for this Honorable Court to review a decision of the United States Court

of Appeals for the First Circuit dealing with discovery abuses and litigation by ambush.

I. THE COURT OF APPEALS RULED AS A MATTER OF LAW AND DID NOT ENGAGE IN ANY FACT-FINDING.

Defendant-Petitioners argue to this Court that the Court of Appeals engaged in "factfinding" in order to conclude that a new trial was mandated by defendants' discovery abuses. (Petition, pp. 14-20.) Specifically, defendants accuse the Court of Appeals of substituting its own credibility determination for that of the District Court with regard to whether defense counsel could have disclosed the letters any sooner than they did (*Id.* at p. 17), in order to support its holding on appeal that defendants had violated both the discovery rules and the July, 1996 discovery order. This contention misrepresents the express holdings of the Court of Appeals on this precise point:

> Defense counsel argued successfully to the district court that the reason the letters had not been disclosed was that counsel had not received them until two days prior to the start of their cross-examination and did not have an opportunity prior to their use at trial to have them translated from Polish to English. This explanation was accepted by the district judge. *But it is beside the point. The fact that a party had not actually obtained certain documents before the discovery deadline does not excuse a violation.*

App. 35a-36a (emphasis added).

Further, still accepting the representations of defense counsel as to when the letters were obtained,[2] the Court went on to hold:

> . . . That defense counsel did not obtain the letters until two days before their use at trial on cross-examination, does not make them admissible. Defendants had been furnished with the address of Mrs. Klonoski's father in Poland more than a full year before trial.[3] Her father and sister lived at the same address. The defendants could, at that time, have undertaken the same investigation that for some unexplained reason did not come to fruition until the trial was near completion. They have offered no legitimate explanation for why they waited as long as they did, knowing that the federal rules and the court had required them to disclose potential trial exhibits and all relevant responses to discovery requests well before the trial began. This suggests that defendants may have been, at best, either lax or negligent in pursuing pretrial discovery.

App. 36a-37a.

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[2] Defendants complain that the Court of Appeals was in error in stating that defense counsel had received the letters "two days prior to the start of their cross-examination." Petition p. 7, n.6. They neglect to point out, however, that defense counsel responded to the district judge's query by admitting "we've known about them, it's no more than two days," App. 13a, when the letters were obtained by defendants' agents in Poland.

[3] Defense counsel made this admission at oral argument before the Court of Appeals, and the Court references it twice. App. 3a, 36a. Defendants cannot now quarrel with their own admission. (*See* Petition, p. 5.)

In short, the Court of Appeals made it clear that it was not concerned with the fact, which it accepted as true, that defense counsel had no knowledge of the letters until two days before they were used. Rather, the Court of Appeals was disturbed by the failure of the defendants to investigate in a timely manner, in order to disclose in a timely manner. This involved absolutely no finding of fact, and no substitution of a higher court's finding for a lower court's finding. Rather, it involved a ruling of law that the failure to investigate, discover, and disclose this highly prejudicial evidence at an earlier point in time was "an egregious breach of the discovery orders and the discovery rules which resulted in 'substantial interference with the full and fair preparation' of plaintiff's case" (quoting from *Anderson v. Cryovac, supra*). App. 43a.

The meticulous legal analysis of the Court of Appeals leading to the holding of discovery abuse as a matter of law, was as follows:

> (1) Rules 26(a)(3) and 26(b)(1) of the Federal Rules of Civil Procedure were designed to ensure that discovery and disclosure occurred *before* trial. App. 26a-27a. As support for this point, the Court of Appeals quoted the following language from *Hickman v. Taylor*, 329 U.S. 495, 500 (1947):
>
> > Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized principles, for the parties to obtain *the fullest possible knowledge of the issues and facts before trial.*
>
> App. 26a (emphasis added by Court of Appeals). The Court also quoted similar language ("The

deposition-discovery procedure simply advances the stage at which the disclosure can be completed from the time of trial to the period preceding it, thus reducing the possibility of surprise") later in the *Hickman* decision. 326 U.S. at 507.

(2) The letters "fit well within [Rule 26's] reach," App. 27a, including the supplementation provisions in Rule 26(e). App. 28a.

(3) Fed. R. Civ. P. 37(c)(1) requires a sanction for failure to disclose, which, "in the ordinary case is mandatory preclusion." App. 29a-30a.

(4) The only exception to the disclosure requirement relates to evidence offered solely for impeachment purposes under Fed. R. Civ. P. 26(a)(3), which the Court of Appeals held to be inapplicable in this case.[4] App. 31a-33a.

(5) Policy reasons also militate against the District Court's ruling that the letters constituted exceptions to the discovery rules. In the words of the Court of Appeals:

> . . . If letters or documents are allowed in evidence after a trial starts for the sole reason that they were not obtained sooner by the party offering them, the rules of discovery and court orders pertaining thereto

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[4] Defendants point out that the District Court's ruling was not ultimately limited to impeachment. (Petition, pp. 18-19.) Of course, this simply means that the District Court's error of law occurred under steps 1 through 3 above, and step 4 (the exception to the general rule) would not even be reached. In addition, step 5 (see *infra*) would also justify the decision of the Court of Appeals.

> would become empty phrases signifying nothing. Trial by ambush would be reborn.

App. 35a.

In sum, although expressing its skepticism regarding the accuracy of the chronology presented by defense counsel,[5] the Court of Appeals did not substitute any "factual findings" regarding that chronology for the District Court's decision[6] to accept those representations. Rather, the Court of Appeals held as a matter of law, that the defendants violated the discovery rules and orders by failing to investigate, and disclose the results of that investigation, in a timely fashion pre-trial.[7]

II. THE COURT OF APPEALS' EXPRESS FINDINGS OF PREJUDICE RESULTING FROM DEFENDANTS' "EGREGIOUS" DISCOVERY MISCONDUCT MANDATED THE ORDER THAT A NEW TRIAL BE GRANTED.

Defendant-Petitioners also argue that their writ should be granted to rectify the purported error of the

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[5] Defendants enumerate the several instances in which the Court of Appeals' Opinion is "rife with suggestions, and at times outright statements, that it did not believe defense counsel's representations." (Petition, p. 17.)

[6] The District Court held no evidentiary hearing on the issue of when defense counsel, or more importantly defendants themselves, first knew of the letters, despite plaintiff's request that such a hearing be held. App. 15a; Ct. App. JA 3810.

[7] The Court of Appeals also expressed strong displeasure with defendants' failure to alert plaintiff to the existence of the letters when they were first purportedly discovered, before plaintiff had even taken the stand. App. 37a.

Court of Appeals in "ignor[ing] the proposition that a jury is presumed to follow its instructions." (Petition, pp. 20-25.) Defendants' argument in this regard fails because: (a) the stated proposition can be overcome by the rule of law that "parties ought not to benefit from their own mis-, mal-, or nonfeasance," App. 42a (quoting from *Anderson v. Cryovac*, 862 F.2d at 924); and (b) as the defendants acknowledge, the stated proposition may also be overborne in "exceptional circumstances." Petition, p. 22.

The Court of Appeals made several compelling points as to why the jury verdict had to be set aside. These included the following:

> We cannot help being impressed by the exquisite timing of the injection of the letters into the trial. Dr. Klonoski, the last witness in the plaintiff's case, had finished his direct testimony. The plaintiff's case had been completed. Cross-examination started with some innocuous questions. This was followed by what clearly were questions setting up Dr. Klonoski for the introduction of the letters. Whether by design or accident the timing could not have been better for defendants.

App. 35a.

> . . . [P]laintiff had already planned and executed his trial strategy based on the evidence available to the parties through discovery. He had presented his entire case, including the direct examination of his lead witness. To spring these letters – hitherto unknown by plaintiff and his attorneys – upon the plaintiff at that stage of the litigation was a lot more than "somewhat . . .

> prejudicial [as described by the district court]." Realistically, it was devastating to his ability to succeed with a jury.

App. 38a.

> We think this case falls well within the parameters of *Anderson*. As already noted, there was, intentional or otherwise, an egregious breach of the discovery orders and the discovery rules which resulted in "substantial interference with the full and fair preparation" of plaintiff's case. We cannot know with certainty what impact the letter excerpts had on the jury, but to dismiss what happened as harmless error would render the discovery rules and orders issued thereunder useless. Moreover, where, as in this case, undisclosed evidence is introduced at a key point in the trial, it would be unrealistic to say that it had no effect on the jury's determination as to liability. If the jury decided that Dr. Klonoski was a tyrant as a husband and a liar, his chances of obtaining a favorable and fair verdict were destroyed. We find that the district court erred as a matter of law in allowing the letter excerpts into evidence and, as in *Anderson*, abused its discretion in not granting plaintiff's motion for a new trial.

App. 43a-44b.

In so holding the Court of Appeals followed a venerable line of cases which make it clear that the burden of prejudice flowing from misconduct must fall on the wrongdoer, and not upon the innocent party, regardless of whether the latter can prove that the misconduct altered the verdict. *See, e.g., Anderson v. Cryovac*, 862 F.2d at 942 (movant need not prove that misconduct altered

verdict); *Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. 1981) (victims of fraud entitled to new trial without necessity of showing that perjury affected outcome of trial); *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, 147 (7th Cir. 1966) (impact of perjury not weighed on motion for new trial).

Defendants cite no authority for the proposition that the presumption upon which they rely (*i.e.*, that a jury follows its instructions) should trump the rule of law that discovery misconduct must inure to the detriment of the offending party, not the innocent party. *See, Anderson v. Cryovac, supra*. Given the Court's focus upon "policy reasons" and the "prevention of abuse by future litigants," App. 350, there is no basis to believe that such a trumping would be appropriate.

In any event, the Court of Appeals made the findings which are necessary to trigger the "exceptional circumstances" exception to the jury instruction presumption. The findings included: "the exquisite timing of the injection of the letters into the trial," App. 35a; that " . . . plaintiff had already planned and executed his trial strategy based on the evidence available . . . ," App. 38a.; that plaintiff had [already] presented his entire case, including the direct examination of his lead witness," App. 38a; that defendants had known where to find Mrs. Klonoski's relatives for more than a year prior to trial, App. 3a; that "defendants' dispatching their investigators to Poland had nothing to do with any 'testimony that [they] had heard in [the] case,' " despite initial representations to the contrary by defense counsel, App. 37a; and, of course and most significantly, the extraordinarily inflammatory and prejudicial nature of the offending evidence. App. 21a.

In sum, the Court of Appeals chose to apply the rule of law governing allocation of the burden of discovery misconduct, rather than the presumption that juries follow the instructions given. Moreover, even if the presumption were to trump the rule of law, the Court of Appeals made more than adequate findings to invoke the "exceptional circumstances" exception to the presumption.

III. THE PETITION PRESENTS NO QUESTION OF IMPORT, AND THE WRIT SHOULD THEREFORE BE DENIED.

The holdings of the Court of Appeals are based upon egregious discovery abuses, in the form of failing to investigate, discover relevant evidence, and disclose that evidence during the discovery period, or at least before trial. The policy reasons enunciated by the Court of Appeals – *e.g.*, to prevent trial by ambush and abuse by future litigants, App. 35a – are not new, controversial, or in need of clarification by this Court; nor, is there a split among the Circuits concerning the issues decided.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Plaintiff respectfully requests that he be awarded his attorneys' fees and costs of opposition, given that no valid, meritorious ground exists for the filing of this Petition and that he has already

been put to extreme expense by defendant-petitioners' conduct during this litigation.

Respectfully submitted,

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APPENDIX A

PERTINENT FEDERAL RULES

In addition to the Rules reproduced in Appendix G to the Petition, the following Rules (in relevant part) are pertinent to this case:

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment. . . .

Rule 60. Relief From Judgment or Order

. . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operations. . . .